No. 840

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. W. ROBERTS,
Plaintiff in Error

vs.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY
AND
RRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error

UPON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON NORTHERN DIVISION

PETITION FOR RE-HEARING

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I.

Defendants in error pray that a rehearing of this cause may be granted, for the reason that the question decided in the opinion rendered herein by this Honorable Court was not directly before it, and was not argued by counsel.

It was apparent to counsel for defendants in error from the very inception of this cause that the question as

to whether or not the letters which passed between Roberts and Traffic Manager Gray constituted a contract was of vital importance. Accordingly upon the trial of the case in the Court below defendants in error argued the matter at length before the Court, upon the ground that the contract, as set forth in the Exhibits contained in the Record, was void for want of mutuality. The Honorable Judge held, however, that while the letters themselves were insufficient to form a binding contract, under the allegations of the complaint it was proper to introduce other evidence which, taken in connection with these letters, might constitute a contract. The case was therefore tried to the jury, and after a trial extending over a period of six days a verdict was rendered in favor of the defendant.

For the reason, therefore, that this question, as to whether or not the letters contained in the record constituted a contract, was fully considered by the Court below, that counsel for defendants thoroughly recognized the importance of that question, that it was not urged by counsel for plaintiff in error, and was only indirectly and remotely before this Honorable Court, the defendants in error pray that a rehearing may be granted, and submit the following argument and authority in support of their petition.

II.

It is stated by this Court that the correspondence contained in the record made it binding upon the defendant to furnish plaintiff "a proportion of the freight pro rata

with the other carriers according to carrying capacity." Grant this to be true. The question then arises, Was Roberts bound to do anything? It is a well known principle that a contract in order to be binding upon one of the parties must be binding upon both. Could Roberts have been compelled by the defendants to haul 100 tons per month, or even one ton, at the price stated, or at any price? The first letter of Roberts was but a proposition to have ready a sufficient number of teams to haul 100 tons of freight per month, provided defendants would agree to give him that amount. Defendants replied by saying that they could not agree to any specified amount, but agreeing to pay the rate of four and one-half cents per pound. To this Roberts replied that he accepted the rate, without any agreements whatever upon his part to do anything. Roberts was not bound by this acceptance to furnish the number of teams stated in his first letter, as that proposal was conditioned upon his being insured one hundred tons of freight per month.. This leaves a contract compelling defendants to pay Roberts 4½ cents per pound for his pro rata of freight, providing he decides to haul that amount, or any amount, and we contend that it is therefore void for want of mutuality.

There are many cases holding that contracts for future sales, where the amount is dependent alone upon the wish or desire of the buyer, are void, but in all cases where the amount to be purchased can be determined, for instance where the buyer agrees to purchase of the seller all the

goods needed in his business for a stated period, such contracts are upheld. It must be borne in mind, however, that in all these cases the seller absolutely agrees to furnish the amount desired.

In the case of Harvester King Co. vs. Mitchell, Lewis & Staver, 89 Fed. 173, it is held that a contract by which one party agrees to order from the other all of certain machines and extras required to supply the trade of a certain territory, which the second party agrees to furnish "without any liability for damages for failure from any cause to furnish such machines and extras" creates no obligation on the part of the second party, and is without mutuality. The court says:

"The stipulation against liability on plaintiff's part for damages for its failure from any cause to comply with the contract in effect releases the plaintiff from any obligation to perform its agreements. Where there is no liability there is no obligation, and without an obligation to perform on the part of one of the parties, neither is bound.

We believe that the principle above announced applies to the case at bar. There was no obligation on the part of Roberts, and therefore no liability on the part of the defendants. Suppose, for instance, that the prices for hauling freight instead of dropping to one or two cents had advanced to ten cents per pound. Can it be said for a moment that the defendants could have compelled Roberts under their contract with him to have hauled any amount of freight at the agreed price of four and one-half cents?

There can be no question whatever but that Roberts could have said: "I have no teams ready to haul ten tons (or whatever the amount might have been). I did not agree to furnish any stated number of teams, for you did not agree to give me any certain quantity of freight."

We will concede that there might have been oral admissions on the part of plaintiff and defendants, subsequent acts of acquiescence, ratification, etc., which, taken in connection with the correspondence referred to above, might have constituted a binding contract. All such evidence, however, was submitted to the jury, and it found in favor of the defendants. It was shown that Roberts did not have a sufficient number of teams to have hauled one hundred tons per month, and there was evidence that he had no teams of his own there.

III.

In support of the principle above contended for defendants in error also cite the following cases:

In the case of Wilkinson vs. Heavenrich, 58 Mich. 574 (55 Am. Rep. 708), it is held that a contract for service for more than a year, signed only by the employer, is void for want of mutuality. The court says:

"It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding must be mutual; and this is especially so when the

consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.'' Many cases are cited by the Court in support of this principle.

In the case of Olney vs. Howe, 89 Ill. 557, it is held: ''To make a valid executory contract there must at least be two parties capable of contracting, and both must be bound. Promises must be concurrent and obligatory on both at the same time to render the promise of either binding.'' The same doctrine is found in Morrow vs. Express Co., 28 S. W. 998.

In the case of Chicago & Great Eastern Railway Co. vs. Francis B. Dane, 43 N. Y. 240, where the defendant offered by letter to receive from the plaintiff and transport from New York to Chicago railroad iron not to exceed a certain number of tons during certain specified months, at a specified rate per ton, and the plaintiff answered accepting the proposal, but not agreeing to deliver any iron for such transportation, it was held that there was no valid contract binding on either party.

The case of Vogel et al. vs. Pekoc (Ill. 1895) reported in 42 N. E. 386, is also in point, as is also the case of Stensgaard vs. Smith (Minn. 1890) reported in 44 N. W. 668.

In the case of Utica & Schenectady Ry. Co. vs. Brinckerhoff, 34 Am. Dec. 220, plaintiff alleged an agreement in writing, whereby it was stipulated that if plaintiffs would locate their road on a certain street, and should require certain lands for that purpose, the defendant would pay appraised value of the land, in consideration to be derived from such location, and the declaration further alleged that the plaintiffs at defendant's request had promised to perform same on their part and that defendant had

promised same on her part, and that though the plaintiffs had performed the agreement by locating the road, defendant had not performed the agreement on her part. The court held that the promise of each must be concurrent and obligatory at the same time to render it binding; that, where there is no promise on the part of plaintiff as consideration for defendant's promise, and it is merely averred that defendants' promise is acted upon it cannot be enforced. The same doctrine is laid down in the case of American Cotton Oil Co. vs. Kirk, 68 Fed. 791.

In the case of Blanchard vs. Detroit & Lansing Lake Michigan Ry. Co., 31 Mich. 43, plaintiff conveyed to defendants a strip of land to be used as a right of way, and defendants as part consideration therefor agreed to erect a depot on the land conveyed and to stop a certain number of trains there daily. Defendants failed to build the depot or stop the trains as required, and plaintiff brought action for specific performance or for damages. The court in the opinion uses the following language:

"The courts do not assume to make contracts for parties; neither do they undertake to supply material ingredients which the parties contracting omit to mention, and which cannot be legitimately considered as having been within their mutual contemplation, and where the party to perform is left by the agreement with an absolute discretion respecting material and substantial details, and these are therefore indeterminate and unincorporated until by his election they are developed, identified and fixed as constituents of the transaction, the court cannot substitute its own discretion, and so by its own act perfect and round out the contract."

The case of Davie vs. Lumberman's Mine Co., 93 Mich. 491 (53 N. W. 625), also sustains the principle we are contending for. In that case plaintiffs made an agreement with defendant to work in its mine and to receive a dollar and a half per ton for all the ore they produced, as long as

they could make it pay. Plaintiffs were to put in the skid roads for hoisting the ore, etc. They entered upon the work and defendant refused to allow them to continue. Held, that an action for breach of contract could not lie. The court said:

"Contracts cannot arise where there is no mutuality; nor can they arise from the action of one party alone, where the other has no power to prevent his action."

The decision in the preceding case is approved and followed in the case of Missouri K. & T. Co. vs. Bagley, 56 Pac. 759, where one H. & Co. of Missouri entered into a contract with a railroad company wherein it was agreed that if H. & Co. would accept certain offers received by them from persons in Mexico for the purchase of corn, the railroad company would transport the same at a certain rate within a definite time. Held, that the contract was not binding upon the ralroad company for want of mutuality, in that H. & Co. were not obliged to ship over said line of railroad.

A contract which imposes no obligation upon one of the parties is void for want of mutuality. Allen vs. Rouse H. & Co., 78 Ill. App. 69.

A reply to an offer for a sale of lumber on conditions indicated by a prior conversation, which falls short or goes beyond such conditions, is no acceptance of the offer. Davenport vs. Newton, 71 Vt. 11 (42 Atl. 1087.)

An agreement by a manufacturer to ship goods and fill orders to be taken by a certain person is not binding for lack of mutuality in the absence of any promise to procure the orders. Wagner vs. Meakin, 92 Fed. Rep. 76.

The case of Clark vs. Great Northern Railway, 81 Fed. 282, also very strongly supports our contention. In that case the court uses the following language:

"The fundamentals of a legal contract are parties, subject matter, assent and consideration. There can be no contract if any of these elements is lacking, and to enforce a contract by legal proceedings it is necessary to set forth the contract with precision and certainty, so as to show a complete contract. . . . And a contract to be enforceable must have the quality of mutuality, for one or several persons who could not be compelled to perform a promise may not compel others to fulfill a promise dependent upon such non-enforceable promise."

Defendants in error therefore contend that the submission to the jury of defendants' exhibit No. 2, as throwing light upon the question whether a contract had been entered into, was not error.

Respectfully submitted,

JOHN P. HARTMAN,
Attorney for Defendants in Error.

I hereby certify that the foregoing petition for a rehearing is, in my opinion, well founded in point of law.

JOHN P. HARTMAN,
Attorney for Defendants in Error.